

**The Radio & General Trading Co Sdn Bhd v
Wayss & Freytag (M) Sdn Bhd**

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D5-
24-100 OF 1996
KAMALANATHAN RATNAM JC
6 JANUARY 1997

Contract — Performance bond — Injunction against call on performance bond — Whether call on performance bond by beneficiary of the bond was inequitable and unconscionable — Whether injunction can be issued against a bondsman — Whether plaintiff could not be prevented from applying for an interlocutory injunction against the beneficiary of the bond — Whether to grant injunction to restrain defendant from calling on the performance bond

The plaintiff contracted with the defendant to perform certain sub-contract works on the Kuala Lumpur Telecommunications Tower. The plaintiff, in accordance with the terms of the contract, placed with the defendant a performance bond equal to 30% of the sub-contract, a sum of RM1,530,000. The sub-contract works were due for completion on 31 October 1995. The plaintiff alleged that it had substantially completed the sub-contract works and the unfinished portion was due to the defendant/or their sub-contractors failing to complete their works on time and the variations requested by the defendant. The plaintiff sought an extension of time for completion because of delays caused by other parties and lack of facilities and access provided by the defendant. The plaintiff formally handed over the sub-contract works to the defendant on 9 February 1996 but the defendant later claimed that certain works were incomplete, estimated to be a maximum of RM40,000. A dispute arose between the plaintiff and the defendant on the plaintiff's claim for variation works. As a result, the defendant then made a demand on the bank for payment of the performance bond.

The plaintiff argued that the defendant does not have the right to call on the performance bond. The defendant filed an application for a stay of all further proceedings for the matter to be referred to arbitration, which was granted by the court. At the same time, the plaintiff sought a perpetual injunction to restrain the defendant from calling on the performance bond.

Held, granting an interim injunction:

The sole consideration in applications for injunctions restraining payment is the existence of fraud or unconscionability. In this case, it was plain that the call on the performance bond by the defendant was inequitable and unconscionable. Therefore, while an injunction cannot be issued against a bondsman — in this case, the bank — the plaintiff could not be prevented from applying for an interlocutory injunction against the beneficiary of the bond. Also, in this case, the obligation to honour the performance bond notwithstanding any

A contest or protest, lay with the bank. However, the beneficiary here could be restrained from receiving the monies as it had not complied with the conditions of the contract regarding the call on the bond (see p 357D-H); *Bocotra Construction Pte Ltd v A-G (No 2)* [1995] 2 SLR 733 and *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149 followed.

B The defendant would not be unduly prejudiced by the grant of the injunction as the subject matter at issue was a performance bond issued by a bank. If the arbitration decides that the defendant was entitled to the bond, payment can still be made. The only damage suffered by the defendant would be the loss of the use of the monies secured by the bond or whatever was due to the defendant, which can be recovered by a civil action. If the injunction was not granted, the bank would be obliged to pay the debt and recover the same from the plaintiff, who in turn can only recover from the defendant after the arbitration proceedings are concluded (see pp 357I and 358A-B).

D The injunction granted was confined to restraining the defendant from receiving monies under the performance bond until the disposal of the arbitration proceedings (see p 358C).

[Bahasa Malaysia summary]

E Plaintiff telah mengikat kontrak dengan defendan untuk menjalankan kerja-kerja sub-kontrak di Menara Telekomunikasi Kuala Lumpur. Menurut terma kontrak, plaintiff telah memberi defendan satu bon pelaksanaan bersamaan dengan 30% nilai sub-kontrak tersebut, bernilai RM1,530,000. Kerja-kerja sub-kontrak tersebut dijangka selesai pada 31 Oktober 1995. Plaintiff mengatakan bahawa ia telah menyelesaikan sebahagian besar kerja-kerja sub-kontrak tersebut dan bahagian yang belum diselesaikan adalah disebabkan oleh kegagalan defendan dan/atau sub-kontraktor dalam menghabiskan kerja-kerja mereka pada masa yang ditetapkan serta pengubahan yang diminta oleh defendan. Plaintiff meminta pelanjutan masa penyelesaian akibat kelewatan yang disebabkan oleh pihak-pihak lain dan kekurangan kemudahan dan akses yang disediakan oleh defendan. Pada 9 Februari 1996, plaintiff telah menyerahkan kerja-kerja sub-kontrak secara rasmi kepada defendan tetapi defendan kemudiannya mengatakan bahawa kerja-kerja tertentu tidak disempurnakan, yang dianggarkan berjumlah maksima sebanyak RM40,000. Pertikaian telah timbul di antara plaintiff dan defendan atas tuntutan plaintiff untuk kerja-kerja pengubahan. Akibatnya, defendan telah menuntut bayaran bon pelaksanaan daripada bank.

I Plaintiff menghujahkan bahawa defendan tidak mempunyai hak untuk menuntut bon pelaksanaan. Defendan memfailkan permohonan untuk menggantungkan semua prosiding lanjut supaya perkara tersebut dirujuk ke timbangtara, yang telah dibenarkan oleh mahkamah. Pada masa yang sama, plaintiff meminta injunksi berkekalan untuk menghalang defendan daripada menuntut bayaran bon pelaksanaan.

Diputuskan, membenarkan injunksi interim:

Satu-satunya pertimbangan dalam permohonan untuk injunksi bagi menghalang bayaran adalah kewujudan fraud atau sesuatu yang tidak berpatutan. Dalam kes ini, adalah nyata bahawa penuntutan bon pelaksanaan oleh defendan adalah tidak saksama dan tidak berpatutan. Maka, walaupun injunksi tidak boleh dikeluarkan terhadap pemegang bon — dalam kes ini, bank — plaintif tidak boleh dihalang daripada memohon injunksi interlokutori terhadap benefisiari bon tersebut. Juga, dalam kes ini, kewajipan untuk melunaskan bon pelaksanaan tersebut tanpa mengira sebarang pertikaian atau bantahan, terletak pada bank. Walau bagaimanapun, benefisiari di sini boleh dihalang daripada menerima wang tersebut kerana ia tidak mematuhi syarat-syarat kontrak mengenai penuntutan bon (lihat ms 357D–H); *Bocotra Construction Pte Ltd v AG (No 2)* [1995] 2 SLR 733 dan *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149 diikuti.

Pemberian injunksi tidak akan memudaratkan defendan dengan tidak sewajarnya kerana isi yang dipersoalkan adalah bon pelaksanaan yang dikeluarkan oleh bank. Jika timbangtara memutuskan bahawa defendan berhak menerima bon tersebut, bayaran masih boleh dibuat. Kerugian tunggal yang dialami oleh defendan adalah kehilangan kegunaan wang yang dijamin di bawah bon tersebut atau apa yang patut diberi kepada defendan, yang boleh didapat balik dalam tindakan sivil. Sekiranya injunksi tidak diberikan, pihak bank akan wajib membayar hutang tersebut dan mendapat kembali yang sama daripada plaintif, yang pula hanya boleh mendapat kembali daripada defendan selepas tamatnya prosiding timbangtara (lihat ms 357I dan 358A–B).

Injunksi yang diberi adalah terhad kepada menghalang defendan daripada menerima wang di bawah bon pelaksanaan tersebut sehingga tamatnya prosiding timbangtara (lihat ms 358C).]

Notes

For cases on performance bonds, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2674–2682.

Cases referred to

- Bocotra Construction Pte Ltd v A-G (No 2)* [1995] 2 SLR 733 (folld)
Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd [1995] 1 MLJ 149 (folld)
Kirames Sdn Bhd v Federal Land Development Authority [1991] 2 MLJ 198 (refd)
Malaysia Overseas Investment Corp Sdn Bhd v Sri Segambut Supermarket Sdn Bhd [1986] 2 MLJ 382 (refd)
Patel Holdings Sdn Bhd v Estet Pekebun Kecil & Anor [1989] 1 MLJ 190 (refd)
Potton Homes Ltd v Coleman Contractors Ltd (1984) 28 BLR 19 (folld)
Royal Design Studio Pte Ltd v Chang Development Pte Ltd [1991] 2 MLJ 229 (folld)

A *Sri Palmar Development & Construction Sdn Bhd v Transmetric Sdn Bhd* [1994] 1 CLJ 224 (refd)

Legislation referred to

Arbitration Act 1952 s 6
 B Contracts Act 1950 s 75
 Specific Relief Act 1950 ss 20, 51(2)

Mr N Balachandran (V Pury & Bala) for the plaintiff.
Mr CF Lim (Azman Davidson & Co) for the defendant.

C *Cur Adv Vult*

Kamalanathan Ratnam JC: By way of a sub-contract dated 4 June 1993 (the agreement) and varied by a supplemental agreement to the agreement dated 21 October 1994 (the supplemental agreement), the defendant appointed the plaintiff to perform certain sub-contract works on the Kuala Lumpur Telecommunications Tower. Clause 4 in the conditions of contract annexed to the agreement provides that the plaintiff shall place with the defendant a performance bond (the bond) equal to 30% of the sub-contract sum. In accordance with their obligations under art 4, the plaintiff caused the Bank of Commerce (M) Bhd (the bank) to issue the bond No 1408LG940735 dated 8 February 1994 in the sum of RM1,530,000 to the defendant. The sub-contract works were due for completion on 31 October 1995. The plaintiff alleged that whilst it had substantially completed all the sub-contract works, the portions of the sub-contract works remaining to be done are as a result of the defendant and/or their other sub-contractors failing to complete their works on time and as a result of numerous variations in the works requested for by the defendant. The plaintiff wrote to the defendant that certain works could not be performed because certain items had not been supplied by the defendant and also due to other defaults of the defendant. The plaintiff then sought an extension of time to complete the works because of delays caused by other parties and due to lack of facilities and access provided by the defendant. The plaintiff also wrote to the defendant providing a schedule of works to be completed and asked the defendant when access could be given to allow the plaintiff to perform certain works. By way of a letter dated 9 February 1996, the plaintiff formally handed over the sub-contract works having been fully installed, tested, fully commissioned and witnessed by the technical supervisor. By a letter dated 16 February 1995, the defendant listed the works which in its opinion remained incomplete and which the plaintiff estimated by way of its reply letter dated 6 March 1996, as amounting to a maximum of RM40,000. A dispute thus arose between the plaintiff and the defendant on the plaintiff's claim for variation works. The defendant then by its letter dated 5 April 1996 made a demand on the bank for the payment of RM1,530,000. It is the plaintiff's contention that the defendant does not have the right under the said agreement to demand payment on the bond, and it further contends that the value of the bond represents a penalty under s 75 of the Contracts Act 1950 and therefore should not be

allowed. Alternatively, the plaintiff contends that the defendant is only entitled to the actual damage suffered by the defendant which the defendant had failed to quantify. The plaintiff thus sought by way of this originating summons (encl 2) the following orders:

- (1) That an injunction be granted on the terms that the defendant whether by itself or by its agents or servants be restrained from calling on and/or receiving payment of the sum of RM1,530,000 or any sum whatsoever under a Performance Bond dated 8 February 1994 and numbered 1408LG940735 issued by the Bank of Commerce (M) Bhd;
- (2) Whether the sub-contract dated 4 June 1993 and/or the Supplemental Agreement to the sub-contract dated 21 October 1994 permit(s) the defendant whether by itself or by its agents or servants to make a call on the Performance Bond mentioned in question (1) above;
- (3) If the answer to question (2) is yes, then a determination by the Honourable Court on the sum that can be called and which is payable under the Performance Bond mentioned in question (1);
- (4) Costs; and
- (5) Any other relief that this Honourable Court may think fit and proper.

The plaintiff then took out an ex parte summons and on 11 April 1996 obtained an order in terms of prayer (1) of encl 2. The inter partes hearing was fixed for 22 April 1996. On the said date, the defendant filed an application (encl 8) for stay of all further proceedings (except the plaintiff's first prayer in the originating summons) pursuant to s 6 of the Arbitration Act 1952 ('the Act'). On 16 May 1996, when encl 8 came up for hearing, Mr Balachandran for the plaintiff indicated that he was raising a preliminary objection to encl 8 and that he had given due notice of such objection. Mr Lim for the defendant indicated that he was ready to respond. Mr Balachandran's objection was that s 6 of the Act did not provide for a partial stay. It was his submission that the defendant must apply for a stay of all proceedings and which meant that the interim injunction would continue until after the arbitration proceedings are completed or alternatively he submitted that the defendant would have to withdraw the application for stay. He contended that if the defendant proceeded to contest the injunction, it would be tantamount to taking steps in the proceedings and that therefore the defendant could not thus avail itself of s 6 of the Act. Mr Lim for the defendant argued that there was no prohibition against severance. Mr Balachandran then withdrew his preliminary objection. I awarded costs to the defendant in any event on the said preliminary objection. There is no appeal against this decision given on 16 May 1996.

In respect of encl 8, I made the following orders on 17 June 1996:

- (1) All further proceedings except injunction proceedings be stayed and be referred to arbitration.
- (2) Costs of the application to be paid to the party succeeding in the arbitration proceedings. There was no appeal against this order.

I was then left to hear encl 2.

- A The plaintiff contended that even though there is a stay of proceedings, it would not be possible to reasonably and rationally submit on encl 2 without making some reference to the subject matter of the dispute itself.

The performance bond

- B The plaintiff does not deny that the performance bond is an 'on demand bond'. However, it is the plaintiff's submission that this does not estop the plaintiff from applying to the court to prevent payment under the bond. The plaintiff relied on *Potton Homes' Ltd v Coleman Contractors Ltd* (1984) 28 BLR 19 at p 28 wherein Eveleigh LJ said:

- C As between buyer and seller, the underlying contract cannot be disregarded so readily. If the seller has lawfully avoided the contract prima facie, it seems to me he should be entitled to restrain the buyer from making use of the performance bond. Moreover, in principle, I do not think it possible to say that in no circumstances whatsoever, apart from fraud, will the court restrain the buyer. The fact of each case must be considered.

- D In reply, Mr Lim for the defence relied on a passage from *Hudson's Building and Engineering Contracts* (11th Ed) Vol 2 at p 1542 and argued that a performance bond operates entirely independently of the degree of performance or non-performance and is effectively the equivalent of a promissory note payable on demand. In further reliance on the same text

- E at p 1544, he submitted that 'whether a bond or guarantee is unconditional or not will depend, therefore, on whether, as a matter of interpretation and expressed intention, and, notwithstanding any references to 'due performance', the requirement of a demand or call by the obligee, or beneficiary, or the provision of some other document or certificate, is seen to override any question of contract compliance as between the debtor and creditor'.

- F In further reliance on the same text, he submitted that the bank or guarantor is obliged to pay the beneficiary without investigation of the contractual position as between the contracting parties except in cases of fraud.

- G In submitting that prayer (1) of encl 2 is in the form of a perpetual injunction restraining the defendant from receiving payment under the performance bond, the defence argued that the said application was premature since the substantial disputes and differences have to be heard in arbitration proceedings. The defendant relied on s 51(2) of the Specific Relief Act 1950 and submitted that a perpetual injunction could only be

- H granted by a decree made at the hearing and upon hearing the merits of the suit. The defendant also relied on s 20 of the Specific Relief Act 1950 and argued that a contract for the non-performance of which compensation in money is an adequate relief could not be specifically enforced and since in the case of a performance bond, compensation in money is always an adequate relief, hence, I ought not to grant the perpetual injunction.

- I The defendant relied on *Malaysia Overseas Investment Corp Sdn Bhd v Sri Segambut Supermarket Sdn Bhd* [1986] 2 MLJ 382 where Siti Norma Yaakob J (as her Ladyship then was) said at p 384:

On the facts of the case before me, the performance guarantee dated 10 August 1984 valid for one year and subject to renewal, is payable upon demand by the defendants and as there is no allegation of any fraud, the plaintiffs cannot stand in the way of the defendants realising the sum under the performance bond.

In *Patel Holdings Sdn Bhd v Estet Pekebun Kecil & Anor* [1989] 1 MLJ 190, a case which concerned an application for an injunction restraining payment under the performance guarantee, the court held that the guarantees, being performance guarantees, the second defendant was obliged to honour them unless it had notice of clear fraud committed by the first defendant. The defendant also relied on *Kirames Sdn Bhd v Federal Land Development Authority* [1991] 2 MLJ 198 which concerned an injunction restraining the defendant from any act of whatsoever nature in relation to the security deposit and to maintain the status quo pending the outcome of the suit which was to be heard by way of arbitration proceedings. Zakaria Yatim J (as his Lordship then was) said at p 202:

Following the authorities I have just cited, I am of the view that the defendant in the present case is entitled to demand payment under the terms of the security guarantee. There is no evidence of fraud in this case ...

Sri Palmar Development & Construction Sdn Bhd v Transmetric Sdn Bhd [1994] 1 CLJ 224 was a case which concerned an application for an injunction restraining the plaintiff from making a demand under the performance bond. Mahadev Shankar J (as his Lordship then was) said at p 227:

It was most strenuously submitted by TM's counsel that if SP was not stopped from calling in the bond, or at least not prevented from using the moneys paid by MAA until the disposal of the arbitration, iniquitous results would follow ... But much as I sympathized with the plight of TM, I regret that there was nothing this court could do but to dismiss the application because the terms of the bond, in my view left the court with no choice.

Finally, the defendant relied on the then Supreme Court decision in *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149 where Peh Swee Chin SCJ said at p 156:

That the real issue of a performance bond is one of contractual interpretation was the unanimous view of three judges in the Court of Appeal in *IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank* [1990] 2 Lloyd's Rep 496; (1991) 51 BLR 1. It is not our intention to write an essay on performance bonds, in the instant appeal, except to repeat that it 'involves a straightforward exercise of construction, or interpretation of the bond to discover the intention of the parties' ... (emphasis added)

Then at p 157, his Lordship continued:

Dealing further with the construction of the performance bond, since we found it was an on demand performance bond, this would, in our view, make the present bond independent of any underlying contract, ie any contract between the buyer and the seller. *We thought, therefore, it was not open to his Lordship in the court below to impart into this on demand guarantee,*

- A *by implication, a requirement to have regard to, or to inquire into any breach of any obligation of such underlying contract, and this seemed to have been done. The next and only other question from the instant performance bonds would be as to what sort of demand it would be required by its wording. (Emphasis added)*
- B The defendant thus submitted that since the performance bond in question was an unconditional on demand performance bond on its true construction, the injunction ought not to be granted since there was also no allegation of fraud.
- C The defendant also relied on the expressed term of the performance bond that payment is to be made notwithstanding any contestation or protest by the plaintiff or by any other third party.
- D At the outset, it would seem that all the authorities inclusive of the highest authority of this land favour the refusal of the grant of an injunction. It should be noted that in none of the cases referred to by the defendant and decided upon by my elders, who are wiser with experience and more knowledgeable than me, was the case of *Potton Homes Ltd* referred to nor considered. It is therefore necessary to consider this case and to see whether if this case had been referred to those of the learned judges who had decided on the cases relied on by the defendant, the result would have been any different.
- E In *Potton Homes Ltd*, the plaintiff and the defendant entered into three contracts. By the contracts, the plaintiffs were to supply the defendants with prefabricated building units. The plaintiffs gave advance payments and a guarantee and performance bond for each contract. The plaintiffs claimed under the contracts. It was admitted that £89,621 was due. The balance was disputed. The defendants alleged defects particularly in relation
- F to the second contract, and made a demand upon the performance bond for the second contract which was for £68,816.92. The plaintiffs obtained an interim injunction restraining the defendants from calling that bond. The plaintiffs then applied for summary judgment in respect of their claim and obtained judgment for £89,621. However, the court ordered a stay of
- G execution because it held that it had no power to restrain the defendants making a call on the bond, but ordered under RSC O 29 r 2(1) that the proceeds of the call on the bond be frozen and be paid into a joint account. The defendant appealed contending that the on demand performance bond should be treated in the same way as a letter of credit as cash in hand.
- H In the course of his judgment, Eveleigh LJ said at p 28:
- I Where there are some grounds for thinking that the plaintiffs might be able to show that the payment by the bank would not be in accordance with the plaintiffs' contract with the bank, then, in deciding whether or not an injunction should be granted, the similarities between a promissory note and a letter of credit, with reference to the life blood of international commerce, may well be relevant considerations.
- As between buyer and seller, the underlying contract cannot be disregarded so readily. If the seller has lawfully avoided the contract *prima facie*, it seems to me he should be entitled to restrain the buyer from making use of the performance bond. Moreover, in principle, I do not think it

possible to say that in no circumstances whatsoever, apart from fraud, will the court restrain the buyer. The facts of each case must be considered. If the contract is avoided or if there is a failure of consideration between buyer and seller for which the seller undertook to procure the issue of the performance bond, I do not see why, as between seller and buyer, the seller should not be unable to prevent a call upon the bond by the mere assertion that the bond is to be treated as cash in hand. It is true that in *Edward Owen Ltd v Barclays Bank*, it was unsuccessfully submitted that the failure of the buyer to procure a letter of credit in accordance with the contract terms should entitle the plaintiffs to an injunction against the bank. That case, however, was not concerned with the position as between buyer and seller, and any statements as to the irrelevance of the failure to provide the letter of credit must be seen in that context.

He continued at p 29:

For a large construction project, the employer may agree to provide finance (perhaps by way of advance payments) to enable the contractor to undertake the works. The contractor will almost certainly be asked to provide a performance bond. If the contractor were unable to perform because the employer failed to provide the finance, it would seem wrong to me if the court was not entitled to have regard to the terms of the underlying contract and could be prevented from considering the question whether or not to restrain the employer by the mere assertion that a performance bond is like a letter of credit.

In the light of this passage, it is necessary for me to look at the facts relating to the call on the performance bond. The plaintiff's numerous complaints to the defendant went unheeded. The plaintiff contended in its affidavit, encl 1, that whilst it had substantially completed all of the sub-contract works, the portions of the sub-contract works remaining to be done were as a result of the defendant and/or the other sub-contract works remaining to be done and also due to numerous variations requested for by the defendant. The plaintiff's various complaints have been listed in extension earlier. As it turned out, a dispute did arise due to the plaintiff's claims on the variation works. Further the plaintiff contended that the value of the remaining works to be done amounted to a maximum of RM40,000 only.

Notwithstanding an affidavit from the defendant denying the plaintiff's allegations and the line of authorities which held that, in the absence of fraud, the defendant ought not to be prevented from calling on the bond, I was of the view that the peculiar facts of the case merited my considering the obiter dicta of Eveleigh LJ. Based on encl 9 which is the defendant's affidavit in reply, the defendant is alleging a loss and damage amounting to RM1,298,033.95 at 10 February 1996 together with a claim of liquidated damages for non-completion from the plaintiff amounting to RM940,000. But these issues are the subject matter of the arbitration proceedings. What is the basis then for the defendant to claim on the performance bond? Considering the view expressed by Eveleigh LJ, this court could consider the issues raised by the plaintiff, which issues in themselves as admitted by the defendant in his encl 9, are matters relevant for arbitration as being 'some grounds for thinking that the plaintiff might be able to show that a payment by the bank would not be in accordance with the plaintiff's

- A contract with the bank, then in deciding whether or not an injunction should be granted, the similarities between a promissory note and a letter of credit, with reference to the life blood of international commerce, may well be relevant considerations'. The decision in *Potton Homes Ltd* was cited with approval and applied by Thean J in Singapore in *Royal Design Studio Pte Ltd v Chang Development Pte Ltd* [1991] 2 MLJ 229 at p 234. His Lordship said:

- ... We are not concerned with the 'irrevocable nature of the obligation assumed by the relevant bank'; we are concerned with the relationship between the parties under the main or underlying contract they made and the dispute arising from such relationship. In the present case, the plaintiff is not restraining the insurance company from paying on the bond, and therefore the question of the insurance company not being able to honour its obligations does not arise. The dispute is only between the plaintiff and the defendant and relates solely to the main or underlying contract made between them. In such case, I do not see why the court should be inhibited from exercising its equitable jurisdiction and restraining the defendant from calling on the bond, if the facts warrant it, merely because the bond is like a letter of credit.

He further held:

- It was argued that to restrain the defendant from calling on the bond would amount to a variation of the agreement. This, in my opinion, cannot be a valid argument. In innumerable cases, courts have, in appropriate circumstances, in exercise of their equitable jurisdiction granted interim injunctions restraining parties from enforcing their contractual provisions until the resolution of their disputes then pending. It cannot be said that such injunctions vary the terms of the contracts. They preserve the positions until trials. In this case, the defendant is only entitled to call on the bond in the event of breach of contract by the plaintiff. The defendant alleged that the plaintiff was in breach of contract, but that allegation is hotly contested; the plaintiff said that it was not in breach and that it was the defendant who was in breach. Obviously, this issue can only be resolved at the trial or arbitration, depending in which forum the parties choose to conduct their litigation. Until that issue is decided in favour of the defendant, it cannot be said that at the moment the defendant is entitled under the agreement to call on the bond.

It seems to me that both these decisions ought to be considered. After all, what the parties are seeking is justice based on equitable principles.

- The very essence of the said agreement is in dispute requiring the parties to go to arbitration. After I had made my order on 17 June 1996 staying all proceedings save for prayer (1) of encl 2 and referring such proceedings to arbitration, there has been no appeal on that order. Whilst the defendant had alleged that the works have not been completed, the plaintiff has annexes a letter from the defendant to its architect requiring a certificate of practical completion. The said letter marked as exh 'N' to encl 12, which is reproduced hereunder is self-explanatory:

Jalan Punchak
Off Jalan P Ramlee
50250 Kuala Lumpur

Attn: Mr Wong Chee Keong

Our Ref: WFMK-OVE-S-12179-95

Date: 31 December 1995

Dear Sir,

Re: Kuala Lumpur Tower Project

Notice of Completion

Undertaking To Complete Any Outstanding Work

We have the pleasure to hereby give this notice to you in accordance to art 20.01 of the Planning and Construction Contract dated 12 January 1991, that the whole of the Construction Works have been substantially completed.

In compliance with the Planning and Construction Contract, we enclose herewith 'Annexure 1' setting out the items rescheduled for deferred completion, which are mainly resulted and attributed to the variation requested by the Employer, and as a result of reprogramming, the agreed general working programme 9009c is hereby referred to.

We further undertake to complete and finish the items listed in 'Annexure 1' hereof, on or before 30 April 1996. We also undertake to finish with due expedition any other outstanding Construction Works, if any, with due expedition during the Maintenance Period.

Pursuant to the above and in accordance to art 20.01 of the Planning and Construction Contract, we hereby request you to issue the Certificate of Practical Completion ('CPC') with effect of 31 December 1995.

We confirm that all areas will be physically available to the Employer by 31 December 1995 and upon issuance of the CPC, your artisans and tradesman shall be able to commence installation.

We further confirm that we have completed the Tower to the extent that the Employer can in the normal course of events be able to commence operations on or before 1 July 1996.

We look forward to receive the CPC in accordance to art 20.01 of the Planning and Construction Contract.

Kindly acknowledge the receipt of this Notice by signing and returning the duplicate of this letter to us.

Thank you.

Yours faithfully

Wayss & Freytag (Malaysia) Sdn Bhd

Sgd

Peter Chiappa

Site Manager

cc Encik Mohd Nasir Bin Haji Ithnin

Mr W Oberliesen

Mr HJ Christ

Mr P Chiapa

Menara Kuala Lumpur
Sdn Bhd
WUFF

A Mr Beh Hong Leong
Mr H Reher
Mr E Daoud
Mr Yoo Ken Seng
Mr D D'Silva

B Enc
PC/g
I hereby acknowledge receipt of the above letter on behalf of Arup
Jururunding Sdn Bhd.

C Name: _____ Signature: _____
I/C No: _____ Date: _____

It is plain therefore that the call on the performance bond is inequitable.

D The decision on *Royal Design Studio* came up for scrutiny by the
Singapore Court of Appeal in *Bocotra Construction Pte Ltd v A-G (No 2)*
[1995] 2 SLR 733 (CA). Whilst declining to overrule the decision of
Thean J, the Court of Appeal held at p 746:

E In our opinion, whether there is fraud or unconscionability is the sole
consideration in applications for injunctions restraining payment or calls on
bonds to be granted. Once this can be established, there is no necessity to
expend energies in addressing the superfluous question of 'balance of
convenience'.

Applying this guideline, I find that it is unconscionable on the part of the
defendant in this case to call on the performance bond.

F In the circumstances and in line with the (then) Supreme Court
decision in *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995]
1 MLJ 149 at p 157, I hold that while an injunction cannot be issued
against a bondsman, the plaintiff could not be prevented from applying for
an interlocutory injunction against the beneficiary of the bond.

G On the issue raised by the defendant that it is a term of the performance
bond that notwithstanding any contest or protest by the plaintiff or by any
other third party, payment is to be made, I hold that the obligation to pay
notwithstanding any contest or protest lies on the bondsman, that is the
bank. The agreement between the plaintiff and the defendant regarding
the call on the bond is contained in arts XXI and XXVI of the conditions
H of contract. I hold that as it has been shown that the defendant has not
complied with arts XXI and XXVI, the defendant should be restrained
from receiving the monies even if the effect is that it would restrain the
bank from fulfilling its obligations under the performance bond. That this
can be done is clearly envisaged in *Esso Petroleum Inc*.

I In any application for grant of injunction, it is necessary to consider
the issue of prejudice. Will the defendant therein be unduly prejudiced if
the injunction is granted? I take the view that there will be no prejudice
because the subject matter at issue is a performance bond issued by a
bank. If it is held, after arbitration, that the defendant was entitled to the

bond, the payment can still be made and any damage suffered by the defendant will only be loss of use of the monies secured by the bond or if less than the total bond amount, whatever is found to be due to the defendant. This amount can at that stage be recovered by way of a civil action if necessary. On the other hand, if the injunction is not extended, the bank will be obliged to pay the debt and would seek to claim the monies so paid, from the plaintiff. The plaintiff will then be forced to wait until after the conclusion of the arbitration proceedings before recovering any monies from the defendant.

Since the defendant had in fact demanded on the performance bond on 5 April 1996 which was before the ex parte court order was granted, the injunction I grant therefore is necessarily confined to restraining the defendant from receiving monies under the performance bond until the disposal of the arbitration proceedings with costs to the plaintiff.

Interim injunction granted.

Reported by KTK Kwan

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